



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cubic Defense Systems

File: B-229884

Date: April 22, 1988

DIGEST

1. Protest that solicitation should be amended to remove basic development requirements and low rate production options because funding may not be available for production options and follow-on contracts for long term production is denied. Although protester speculates that its competitors, who were aware that funding might not be available, may have submitted unrealistically low prices knowing they would not have to perform the work, it has submitted no evidence that its competitors have superior knowledge of possible funding restrictions or that it could submit a more competitive proposal under a revised solicitation.
2. Protest that agency should not have requested certification of cost or pricing data is denied where contracting officer determined, in accordance with regulations, that award selection was not based on adequate price competition since under solicitation price was not the primary basis for award.
3. Where articles in trade publications submitted by protester to show agency disclosure of protester's prices do not include prices and do not attribute information regarding pricing to agency, and agency denies disclosing prices, protester's contention in this regard is unsupported.
4. Contentions that agency coerced protester into changing technical approach during negotiations and that agency improperly solicited second round of best and final offers are untimely where protest was not filed prior to next closing date for receipt of proposals.

DECISION

Cubic Defense Systems protests any award under request for proposals (RFP) No. F33657-87-R-0103 issued by the Air Force for full scale development of an advanced tactical air

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reconnaissance system (ATARS). The ATARS is a reconnaissance avionics system consisting of an electro-optical (EO) sensor suite providing image acquisition, data storage, image manipulation, system control functions, and data linking to ground stations. Cubic's principal contentions are that the RFP should be revised to preclude evaluation of options for which there is no reasonable likelihood of funding; the Air Force improperly disclosed Cubic's pricing information; and the Air Force's decision to require the offerors to certify their cost or pricing data was improper. We dismiss the protest in part and deny it in part.

The purpose of the ATARS program is to provide the armed forces with a new tactical reconnaissance capability. According to the RFP, ATARS is to replace existing reconnaissance film systems in the Air Force's RF-4C aircraft as part of a general RF-4C upgrade program, and provide EO and infrared (IR) sensors and supporting subsystems for other aircraft, including the Air Force's yet-to-be-named follow-on tactical reconnaissance (FOTR) aircraft and the Navy's F/A-18D(RC), F-14D and unmanned air reconnaissance system (UARS). The statement of work (SOW) provides that it is the agency's intent under the ATARS program to develop sensors, recording devices, data links, installation kits and other supporting subsystems for common application into manned and unmanned aircraft and that the contractor will be responsible for establishing common design and test requirements to ensure that these subsystems are compatible with all applications.

The basic requirements of the RFP include full-scale development (including fabrication, testing, delivery and flight test support) of the sensor suite, integration kits, software, support equipment, spare parts, descriptive data and other information for ATARS units for the RF-4C and the Navy's UARS. The RFP also includes priced and evaluated options for full-scale development and integration of IR sensor units into the Navy's UARS and fabrication of EO sensor suites for the F/A-18D(RC) and the F-14D. The RFP also includes priced, evaluated options for a small quantity of ATARS production units for the RF-4C, the UARS and the F/A-18D(RC).

The RFP anticipates award of a firm-fixed price research and development contract with the options, including the production unit options, incorporated in the award evaluation. The evaluation and award under the RFP are to be based on assessment of each proposal under the following evaluation factors, listed in descending order of importance: technical, supportability, life-cycle cost, management/manufacturing. The RFP indicates that the evaluation factor

relating to life-cycle cost will include evaluation of the realism, reasonableness and completeness of each offeror's price proposal, as well as their estimates of total program cost. Finally, the agency reserved the right to award to other than the offeror with lowest cost and/or the best proposed performance.

Four firms, including Cubic submitted proposals by the initial July 6, 1987, closing date. After initial proposal evaluation, one offeror was eliminated from the competitive range. The agency then requested that the remaining offerors submit best and final offerors (BAFOs) by September 25. Three firms, including Cubic, submitted BAFOs. The contracting officer then determined that additional discussions were necessary.

Discussions were conducted with the three competitive range offerors and a second round of BAFOs was requested on November 20 and submitted on November 30.

On December 4, the National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, 101 Stat. 1019 (1987), was signed into law. The conference committee report on the Authorization Act, H.R. Rep. No. 466, 100th Cong., 1st Sess. 571 (1987), included the following language:

" . . . The conferees agree to authorize \$47.0 million for FOTARS [Follow-On Tactical Reconnaissance System] with the understanding that the RF-4C upgrade will not be initiated unless it is justified and specifically authorized. The conferees agree that a more survivable penetrating reconnaissance aircraft should be developed."

On December 22, at a meeting with Air Force contracting officials, Cubic says that it learned that the agency planned to proceed with the procurement without eliminating the RF-4C as the basic platform for ATARS development, and the agency was requiring offerors to certify their cost or pricing data. Cubic then protested to our Office on December 23. Award has not been made pending resolution of the protest.

Cubic principally complains that the RFP should be amended to discontinue use of the RF-4C as the basic platform for development of ATARS and to remove RF-4C production options from the evaluation. Cubic argues that the ATARS development work instead should be based on a generic FOTR aircraft, and that another round of BAFOs should be conducted to allow offerors to adjust their prices to the

revised requirements. In its initial protest submission, Cubic relied on the excerpt from the conference committee report on the 1988 and 1989 Department of Defense (DOD) Authorization Act cited above, and a June 1987 report from our Office which suggests that the Air Force should retire the RF-4C aircraft from the reconnaissance mission and should instead use the new F-16 for reconnaissance.^{1/} Cubic argues that because of concerns about survivability and cost effectiveness, it is unlikely that Congress will provide full funding to upgrade the RF-4C fleet with ATARS.

Cubic also maintains that its position in this regard is further supported by the Secretary of Defense's report on the amended 1988 and 1989 DOD budget. That report states that although the Air Force will continue with EO sensor development, the Air Force "has decided to forgo upgrading existing RF-4C aircraft with the new sensors, given the limited long-term survivability of these aircraft. Instead, other alternatives to meet long-term Air Force tactical reconnaissance needs are being considered."

The protester maintains that because of future funding restrictions, it is unlikely that the awardee will be required to perform the full requirements of the RFP. According to Cubic, its competitors, who were aware that funding might not be provided for production of ATARS units for the RF-4C, may have submitted unrealistically low prices, particularly in the second round of BAFOs, with the knowledge that they will not be required to perform work relating to the RF-4C which the agency has decided to forgo.

1/ That report, GAO/NSIAD-87-163, states in relevant part:

"In a separate GAO report (GAO/NSIAD-C-87-11) to be released to the Chairman, Subcommittee on Defense, House Appropriations Committee, we note that certain cost and operational effectiveness benefits will result if the Air Force retires RF-4C aircraft for the reconnaissance mission and replaces them with new F-16 aircraft. The Air Force currently plans to use the RF-4C aircraft until the late 1990's before replacing them. The report notes that the tactical reconnaissance mission requires penetration into enemy territory and requires an aircraft that is difficult for enemy air defense forces to locate and attack. The high maneuverability, low radar detectability, and low fuel consumption characteristics of the F-16 make it well suited for the reconnaissance mission."

Cubic maintains that this may be the case with respect to both the basic ATARS development work, which is based on upgrading the RF-4C, and with respect to the production options for the RF-4C, which Cubic says must be exercised before any other options.

Further, Cubic argues that under the Federal Acquisition Regulation (FAR) § 17.206(a)(1), the agency's evaluation of the RF-4C production options, which are not likely to be funded, is improper. In this respect, Cubic maintains that since the core requirements under the RFP and many options are based directly or indirectly on upgrading the RF-4C, the RFP in its present form is defective since it no longer reflects the work to be performed.

In response, the Air Force argues that its handling of the ATARS program is consistent with the statement in the conference committee report regarding ATARS and the RF-4C. Noting that the conference committee report states only that the RF-4C upgrades will not be initiated unless they are "justified and specifically authorized," the agency says that the report does not indicate an intent to preclude ongoing ATARS development efforts.

The Air Force also rejects Cubic's contention that some offerors may have gained an advantage in the procurement by submitting unrealistically low prices for the basic development requirement and production options for the RF-4C on the belief that, after elimination of the RF-4C from the program, they will not be required to perform at those prices. The Air Force states that, in accordance with the RFP evaluation criteria, the prices of all three competitive range offerors were evaluated and judged to be realistic and complete.

Finally, after the release of the Secretary of Defense's budget statement and in response to Cubic's protest submission on that statement, the Air Force submitted to our Office a memorandum from the Assistant Secretary of the Air Force (Acquisition) to the Under Secretary of Defense (Acquisition). That memorandum states that the Air Force's Fiscal Year 1989 budget submission for the ATARS included funding for full-scale development of a common EO sensor suite. The memorandum also says that it was the Air Force's intent to "delete RF-4C unique funding requirements" in fiscal year 1989, while retaining the RF-4C as a "platform option for the ATARS program." The memorandum further suggested the following as the DOD/Air Force "unified position" on ATARS:

"The Air Force and DOD continue to support the full-scale development of the Advanced Tactical Air Reconnaissance System (ATARS). The focus of this program is the development of an electro-optical sensor suite to be used on a variety of Air Force and Department of Navy manned and unmanned programs. The Air Force intends to use the RF-4C as the Development, Test, and Evaluation vehicle for EO modernization. During the development of ATARS, the Air Force will continue to consider force structure availability and fiscal realities during its examination of platform alternatives. We will advise the appropriate Congressional committees of proposed Air Force actions and justification."

We are unpersuaded by Cubic's contentions regarding future ATARS funding for the RF-4C. First, we note that there is no Congressional restriction on use of the RF-4C as a development, test and evaluation vehicle for the ATARS, as called for by the RFP. The conference report on the DOD Authorization Act merely expresses the conferees' understanding that the RF-4C fleet will only be upgraded with ATARS if that action is justified and specifically authorized. Moreover, although Cubic argues that the ATARS development effort should focus instead on the Air Force's FOTR aircraft (its yet-to-be-named follow-on reconnaissance aircraft), the Air Force does not expect to decide on that aircraft until fiscal year 1989. With regard to the FOTR aircraft, the SOW "recognizes the uncertainty in designing equipment for compatibility with an unidentified aircraft. . . ," and, as a result, significantly limits the design and development efforts for ATARS on the FOTR. Thus, the probable result of basing the ATARS development effort on the as-yet-undetermined FOTR, as Cubic argues, would be less definite contract requirements and delay in overall ATARS development.

We recognize that, given Congressional concerns with the cost effectiveness and long-term survivability of the RF-4C, there is a question whether the ATARS production options for the RF-4C will be funded and whether authorization and funding will be provided at some future time for full-scale RF-4C ATARS production. In this respect, although the conference committee report does not expressly forbid the long-term use of ATARS in the RF-4C, both that report and our report express the concern that a more survivable and cost effective long-term alternative should be found. Moreover, the DOD budget report indicates a determination that the RF-4C fleet will not be upgraded with ATARS.

Nonetheless, we fail to see how Cubic is prejudiced by these circumstances. Cubic says that its competitors were aware that funding might not be provided for RF-4C production options or for long-term upgrading of the RF-4C with ATARS, and that those firms may have submitted unrealistically low prices on the basic RFP requirements relating to the RF-4C and on the RF-4C production options knowing that they would not be required to perform at the offered prices. Cubic, however, has submitted no evidence, and, in fact, does not contend, that its competitors had any superior knowledge of possible funding restrictions which gave them an advantage that Cubic did not share. Cubic also does not contend that it could submit a more competitive proposal under an amended RFP without the RF-4C requirements. Further, Cubic's argument that RF-4C production options should not have been evaluated because funding is uncertain for those options, is unpersuasive since such reasoning would invalidate all solicitations calling for evaluation of option years. See Kidde, Inc., Weber Aircraft Division, B-223935, et al., Nov. 19, 1986, 86-2 CPD ¶ 587.

Cubic also contends that the agency's request for a certificate of current cost or pricing data was improper. According to Cubic, such a certificate should not be requested when award will be based on adequate price competition. Cubic maintains that award under the RFP will be based on adequate price competition since price is a significant evaluation factor. Cubic also argues that the certificate of current cost or pricing data, if required, should be based on more current data than that submitted in the second round of BAFOs, and that the agency should request such data in another round of BAFOs.

A certificate of current cost or pricing data is generally not required when the contracting officer determines that prices submitted are based on "adequate price competition." FAR § 15.804-3(a)(1). Adequate price competition exists if two or more responsible offerors submit offers meeting the government's requirements and the contract is to be awarded to the offeror submitting the lowest evaluated price. FAR § 15.804-3(b). Here, the contracting officer requested certificates based on his determination that there was not adequate price competition, since price is not the primary basis for the award decision.

We have no reason to disagree with the contracting officer's decision to request the certificates. Under the RFP evaluation and award scheme, an offeror's price proposal is only one element to be considered under the third least important evaluation factor, life-cycle cost. Thus, although price is to be a factor in the award decision, that decision will be based primarily on technical and other non-price

considerations. While a certificate of current cost or pricing data should not be required when the contracting officer determines that adequate price competition exists, the contracting officer has broad discretion to make that determination. Serv-Air, Inc.--Reconsideration, 58 Comp. Gen. 362 (1979), 79-1 CPD ¶ 212. Cubic has not shown that the contracting officer's determination was unreasonable. We also reject Cubic's contention that offerors should be required to update cost or pricing information in another round of BAFOs. We do not think that the delay between the second round of BAFOs and the request for the certificate of cost or pricing data--less than 1 month--was such that the agency's decision not to require updating that data is unreasonable.

Cubic also argues that its prices have been publicly disclosed by the Air Force. In support of this contention Cubic argues that information concerning the apparent favorable position of one of the offerors, which Cubic maintains could only be it, has circulated in a number of industry publications. One article submitted by Cubic states: "One contractor or contractor team is rumored to have submitted a bid that was far less expensive than the other teams." A second article states: "Sources say that Cubic Corp. is aggressively bidding the program and that the Boeing/GD team is currently high bidder." Cubic maintains that it has not been responsible for the disclosures and that, since the source of the leaks appears to have knowledge of the prices of more than one offeror, the Air Force is the only plausible source.

In response to these allegations, the contracting officer says that he reviewed the procedures for preventing disclosure of sensitive source selection data and found that they were properly followed. Further, the Air Force denies that it disclosed Cubic's prices.

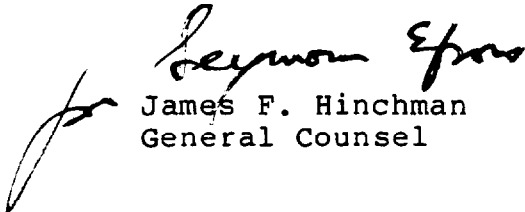
The protester has presented no evidence that the Air Force disclosed Cubic's prices. The articles submitted by Cubic did not disclose Cubic's prices and did not attribute information regarding pricing to Air Force officials. There is simply nothing in the record to support the protester's position and we will not find improper action by an agency based on inference or conjecture. Bachan Aerospace Corp., B-227124, Aug. 31, 1987, 87-2 CPD ¶ 210.

Finally, Cubic argues that during the discussions in early November, the Air Force coerced it into substituting a significantly more expensive data link for the in-house data link it originally proposed. Cubic also contends that the second round of BAFOs which followed the November discussions was unnecessary. Cubic argues that these

circumstances indicate an attempt by the Air Force on the one hand to influence Cubic to raise its price, while giving other offerors the opportunity to lower their prices in their second BAFOs. Cubic argues that this amounts to a prohibited auction.

Cubic's allegation that it was coerced into changing its data link approach is based on statements made by agency officials at negotiations conducted on November 6 and 7. During those negotiations, according to Cubic, contracting officials indicated to Cubic that it would have to change its data link approach to receive further consideration. The request for the second round of BAFOs was made on November 20. To be considered timely, these issues were required to be protested to our Office or the agency before the next closing date for receipt of proposals, which was November 30. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1987); G.E. Calma Co., B-227974, Aug. 24, 1987, 87-2 CPD ¶ 200. Since Cubic did not protest these issues until December 23, they are untimely and will not be considered.^{2/}

The protest is dismissed in part and denied in part.



James F. Hinchman
General Counsel

^{2/} Cubic also raised these issues in a December 11 letter to the agency. Even regarding that letter as an agency-level protest, it also was untimely since it was filed after November 30. 4 C.F.R. §§ 21.2(a)(1), (a)(3); Target Financial Corp., B-226683, June 29, 1987, 87-1 CPD ¶ 641.